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Supreme Court, U.S.
FILED
No. _____ 06-383 SEP 15 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

JAMES GILBERT BERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED FOR REVIEW

The following question is presented by the Petition for Writ of Certiorari:

Whether Berry was constitutionally disadvantaged by the arbitrary placement of his Petition for Writ of Certiorari on the docket of the United States Supreme Court?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the chief Justice and Associate Justices of the Supreme Court of the United States:

James Gilbert Berry, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, reproduced in the Appendix, herein at pages 1a-3a, and affirmed by a denial of the Motion for Certificate of Appealability, reproduced in the Appendix, herein, at page 4a-5a.

OPINIONS BELOW

The opinion of the Unites States District Court for the Western District of Virginia at Roanoke, Case Number 5 7:05CV00574 is unreported and reproduced in the Appendix, herein, at pages 7a-8a. Berry appealed the denial of the Motion for Certificate of Appealability to the United States Court of Appeals for the Fourth Circuit, but his claims were rejected and on June 20, 2006, and hisconvictions were affirmed in an unpublished opinion, United States v. James Gilbert Berry, Case number 06-6425, reproduced in the Appendix, herein, at pages 1a-3a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 and Amendment VI of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced in the appendix herein:

21 U.S.C. § 841 – Prohibited Acts A at page 15a.

21 U.S.C. § 846 – Attempt and conspiracy at page 31a.

28 U.S.C. § 1254 – Courts of appeals; certiorari; certified questions at page 32a

28 U.S.C. § 2255 – Federal custody; remedies

STATEMENT OF THE CASE

On June 13, 2002, Berry, along with twelve other individuals, was indicted for conspiracy to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. Sections 841(a)(1) and 846. The jury returned a guilty verdict on the charge of conspiracy and found that the government proved beyond a reasonable doubt that the object of the conspiracy was to possess, with intent to distribute, 500 grams or more of a mixture of methamphetamine.

At the sentencing hearing on April 11, 2003, the Court determined that Berry was accountable for 10,583.25 kilograms of marijuana pursuant to the calculations present in the presentence report. Berry objected to the presentence report sentencing

recommend[illegible]s, specifically objecting to the method by which drug weight to be assessed against Berry was calculated by the government. The Court adopted the presentence report as his findings in the case: that Berry had a total offense level of 41, a criminal history category of 5 resulting in a custody range of 360 months to life. Accordingly, the Court sentenced Berry to 360 months and supervised release for five years on conditions and the payment of certain penalties.

The district court entered a final judgment against Berry on April 14, 2003. Notice of appeal was filed April 21, 2003. The United States Court of Appeals for the Fourth Circuit affirmed the conviction on January 21, 2004. Berry then filed his Petition for Certiorari with the United States Supreme Court on June 14, 2004. Berry's case was considered by the United States Supreme Court during its term calendar which began October 1, 2004. Berry's Petition for Certiorari was denied on October 4, 2004.

On or about September 14, 2005, Berry, by counsel filed a 28 U.S.C. § 2255 Motion to Vacate, Set Aside or Correct Sentence with the district court. The district court denied Berry's motion on September 29, 2005. (Appendix herein at page 14a). On October 14, 2005, Berry filed a Motion to Reconsider the September 29, 2005 Order on the grounds that the opinion in United States v. Booker, 543 U.S. 220 (2005), applied to all cases on direct review and that Berry's case was on direct review during the term in which Booker was decided. Berry's Motion to Reconsider was denied on

November 8, 2005. (Appendix herein at page 9a). On November 11, 2005, Berry filed a Motion for a Certificate of Appealability which was denied by the district court on November 18, 2005. (Appendix herein at page 7a). On April 10, 2006, Berry filed an appeal with the United States Court of Appeals for the Fourth Circuit which denied Berry's Motion for Certificate of Appealability June 20, 2006.

REASONS FOR GRANTING CERTIORARI

In this appeal, Berry contends that the very nature of docketing cases during a term of the Court unjustly disregards the constitutional effect the Court's holdings in one case may have on all other cases pending before the Court during the same term. On October 4, 2004, Berry's petition for writ of certiorari to the United States Supreme Court was denied. On that very day the Court heard arguments on the case of United States v. Booker, 543 U.S. 220 (2005). The Court later held in Booker, on January 14, 2005 that the provision in the Federal Sentencing Guidelines requiring mandatory application violated the Sixth Amendment.

On or about September 15, 2005, and pursuant to the rule enunciated in Booker, Berry, by counsel, filed a 28 U.S.C. § 2255 Motion with the district court to re-sentence him on his 2003 conviction on the grounds that his sentence violated his Sixth Amendment rights. Berry directed the Court to United States v. Hughes, 396 F.3d 374 (4th Cir. 2005) in which Hughes' sentence was enhanced based on facts found by the district court, not by the jury. In light of Booker, the Court of Appeals in

Hughes vacated and remanded the case for re-sentencing consistent with the Booker opinion, finding that the district court clearly violated Hughes' Sixth Amendment right by imposing a sentence exceeding the maximum authorized by the jury findings alone. Berry asserted that his Sixth Amendment rights were likewise clearly violated. However, on September 29, 2005 the district court in its opinion held that Booker does not apply retroactively to § 2255 motions for collateral review. (Appendix herein at page 11a-13a).

In Griffith v. Kentucky, 479 U.S. 314, 323 (1987), the Court acknowledged, that the "Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Berry posits that the "norms of constitutional adjudication" embrace the substance of his case before this court; that a case pending during a term of court must be found to benefit from the retroactive application of the favorable holding in another case decided during that same term. By exercising retroactivity beginning the first day of the Court's term, the Court adheres to the "nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *Id.* at 323, citing United States v. Johnson, 457 U.S. 537, 546-547, 555 (1982). With such an application of the principle of retroactivity, judicial review is not affronted by selectivity as to cases pending on direct review in the same term of court. The Court further

acknowledged an "actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a new rule" and further stated that it had "tolerated this inequity for a time" but responded "the time for toleration has come to an end" *Id* at 556.

The proper date for consideration of the direct appeal "cut-off" should be the opening day of the term of the Court which announces the decision, which date, in this case, would be October 1, 2004. Petitioner's case was on direct appeal at the same time as Booker. In accordance with the language of the Booker decision, the Supreme Court's holding applies "retroactively to all cases ... pending on direct review." 543 U.S. 220, 268 (2005).

The import of finality of judgment as an interest of retroactivity would not be diminished with the Court's application of the rule Berry is seeking to have recognized. By holding that a rule of direct application of binding effect as to decisions made within a single term of court upon the cases pending before that court during the entire term would not result in a weakening of the finality of a judgment so favored in Teague v. Lane, 489 U.S. 288 (1989). Berry argues that a much greater effect would be accomplished with the clarity of the parameters for retroactive application having the opening day of a term as its starting point.

Berry posits to this court that the instant case illustrates the viewpoint held by the Court, that, "selective application of a new rule violates the

principle of treating similarly situated defendants the same". Griffith v. Kentucky, 479 U.S. 314, 323 (1987) citing Desist v. United States, 394 U.S. 294, 258-259 (1969). By virtue of the arbitrary placement on the docket, Berry's case while on direct review was denied on October 4, 2004, the same day arguments were heard on a case, which by it's decision on January 14, 2005, the Court provided validation and the hope of relief from the violation of Berry's Sixth Amendment right. Berry argues that retroactive application of the Booker holding to all cases on direct review in the same term would not disturb the value inherent in the finality of judgment but would expand the constitutional relief embodied in the nature of judicial review. The artificial barrier to constitutional relief which is created by the arbitrary effect of scheduling decisions is at least as great as the acknowledged inequity referenced in the Johnson case.

In this appeal, Berry contends that it is unconstitutionally arbitrary to declare the date for retroactivity for United States Supreme Court cases to be anything other than the opening day of the term for that session of court. In that way no pending cases can be constitutionally disadvantaged by the happenstance of the placement of the controlling case on docket. The Supreme Court does not have a revolving docket but specific yearly terms which open for the year and adjourn for the year.

The standing procedure allowing for the random placement of matters on the docket of the Supreme Court fails to acknowledge the significant constitutional effect of not applying the holding of

one case decided during the term of the Court to other cases before the court in the same term.

The trial court erred in denying Berry's Motion for Certificate of Appealability.

CONCLUSION

For the reasons stated, James Gilbert Berry respectfully requests that this court grant certiorari.

Respectfully submitted,
JAMES GILBERT BERRY

By: /s/

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-6425

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

Versus

JAMES GILBERT BERRY,
Defendant – Appellant.

[ENTERED: June 20, 2006]

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James P. Jones, Chief District Judge. (5:02-cr-30046-jp-10; 7:05-cv-00574-jpj)

Submitted: June 15, 2006

Decided: June 20, 2006

Before, KING, SHEDD, and DUNCAN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Joseph Abraham Sanzone, SANZONE & BAKER, PC, Lynchburg, Virginia, for Appellant. William Frederick Gould, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

See Local Rule 36(c).

PER CURIAM:

James Gilbert Berry seeks to appeal the district court's orders denying relief on his 28 U.S.C. §2255 (2000) motion and subsequent motion to reconsider. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. §2253(c)(1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F. 3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and

conclude that Berry has not made the requisite showing. See United States v. Morris, 429 F. 3d 65, 72 (4th Cir. 2005) (holding that United States v. Booker, 543 U.S. 220 (2005), is not retroactively applicable to cases on collateral review). Accordingly we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED.

JUDGMENT

FILED: June 20, 2006

UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 06-6425
5:02-cr-30046-jpj-10
7:05-cv-00574-jpj

UNITED STATES OF AMERICA
Plaintiff – Appellee

v.

JAMES GILBERT BERRY
Defendant – Appellant

[ENTERED: June 20, 2006]

Appeal from the United States District court for the Western District of Virginia at Roanoke

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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
AUGUST 14, 2006

No. 06-6425
5:02-cr-30046-jpj-10
7:05-cv-00574-jpj

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAMES GILBERT BERRY

Defendant – Appellant

[ENTERED: August 14, 2006]

MANDATE

The judgment of this Court, entered 6/20/06, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES GILBERT BERRY,
Petitioner, Case No. 7:05CV00574

v **ORDER DENYING COA**

UNITED STATES OF AMERICA,
Respondent.

By: James P. Jones
Chief United States
District Judge

[ENTERED: November 18, 2005]

The petitioner has filed a Motion for Certificate of Appealability. A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(1) (2000) (West Supp. 2005); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). For the reasons stated previously in this case, I conclude that the petitioner has failed to make a substantial showing of denial of a constitutional right and is therefore not entitled to a certificate of appealability.

Accordingly, it is **ORDERED** that the Motion for a Certificate of Appealability is **DENIED.**

ENTER: November 18, 2005

/s/ James P. Jones
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES GILBERT BERRY,
Petitioner, Case No. 7:05CV00574

v. **ORDER**

UNITED STATES OF AMERICA,
Respondent.

By: James P. Jones
Chief United States
District Judge

[ENTERED: November 8, 2005]

Petitioner James Gilbert Berry brings this Motion for Reconsideration challenging the September 29, 2005, Order dismissing petitioner's Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C.A. §2255. Petitioner argues that the rule in *United States v. Booker* should apply to his claim, because his writ of certiorari was pending during the same term that the rule in *Booker* was announced. *United States v. Booker*, 125 S. Ct. 738 (2005).

I hold that petitioner's conviction was final at the time that the rule in *Booker* was announced, and therefore, that the rule does not apply to his case. "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which become final before the new rule is announced." *Teague v.*

Lane, 489 U.S. 288, 310 (1989). The United States Supreme Court denied petitioner's writ on the day of *Booker's* oral argument (Mot. Recons. At 1.) Thus, petitioner's case was no longer pending on direct review when the new rule in *Booker* was announced. As a result, *Booker* does not apply to petitioner's case, nor does the fact that the ruling in *Booker* came down within a year of the final order in this case require resentencing.

Accordingly, it is **ORDERED** that petitioner's Motion for Reconsideration is **DENIED.**

ENTER: November 8, 2005

/s/ James P. Jones
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES GILBERT BERRY,
Petitioner, Case No. 7:05CV00574

v. **OPINION**

UNITED STATES OF AMERICA,
Respondent.

By: James P. Jones
Chief United States
District Judge

[ENTERED: September 29, 2005]

Joseph A. Sanzone, Sanzone & Baker, P.C., Lynchburg, Virginia, for Petitioner.

Petitioner James Gilbert Berry, a federal inmate proceeding by counsel, brings this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. §2255 (West 1994 & Supp. 2005). In his motion, Berry requests re-sentencing on his 2003 conviction based on the United States Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). Because I find that *Booker* does not apply retroactively to Berry's case, I must summarily dismiss his §2255 motion.

Berry pled not guilty in this court to a charge of conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, in violation of

21 U.S.C.A. §§841(a)(1) and 846 (West 1999 & Supp. 2005). After a two-day trial in January, 2003, a jury found Berry guilty. I sentenced Berry on April 11, 2003 to 360 months in prison. Berry appealed, and the United States Court of Appeals for the Fourth Circuit affirmed his conviction and sentence. *United States v. Berry*, 87 Fed. Appx. 312-314 (4th Cir. 2004) (unpublished). The Supreme Court denied Berry's subsequent petition for a writ of certiorari on October 4, 2004. *Berry v. United States,* 125 S. Ct. 56 (2004). Counsel filed this motion on Berry's behalf on September 15, 2005.

Berry alleges that his sentence violates the rule of *Booker*. The Supreme Court in its *Booker* decision, extended the rule in *Blakely v. Washington*, 542 U.S. 296 (2004), to invalidate the United States Sentencing Guidelines in part. *Booker*, 125 S. Ct. at 746. This court has held that the rule in *Blakely* does not apply retroactively to cases on collateral review. *See Lilly v. United States*, 342 F. Supp. 2d 532, 583 (W.D. Va. 2004). Following the rationale of *Lilly*, I find that *Booker* does not apply retroactively to cases on collateral review, a view adopted by all of the courts of appeal that have considered the issue. *See United States v. Cruz*, No. 03-35873, 2005 WL 2243113, at *1 (9th Cir. Sept. 16, 2005) (citing cases).

Because Berry's conviction became final prior to the decision in *Booker*, I find that *Booker* does not apply retroactively to his §2255 motion for collateral review. Berry has not raised any other ground for relief under §2255, and thus I must dismiss his motion.

An appropriate Final Order will be entered herewith.

DATED: September 29, 2005

/s/ James P. Jones
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

JAMES GILBERT BERRY,
Petitioner,

Case No. 7:05CV00574

v.

FINAL ORDER

UNITED STATES OF AMERICA,
Respondent.

By: James P. Jones

Chief United States District Judge

[ENTERED: September 29, 2005]

In accordance with the accompanying Opinion, it is hereby **ADJUDGED** and **ORDERED** that the petitioner's Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C.A. §2255 is hereby **DISMISSED,** and this case is stricken from the active docket of this court.

ENTER: September 29, 2005

/s/ James P. Jones
Chief United States District Judge

Title 21 - Food and Drugs
Chapter 13 Drug Abuse Prevention And Control
Subchapter I Control And Enforcement
Part D Offenses and Penalties

21 U.S.C. §841 - Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving -

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-(1- (2-phenylethyl) -4-piperidinyl) propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the

defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving -

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this

paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a

prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant

substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment

of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed -

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and

knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use -

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution. -

(A) In general. -

Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition. -

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise

conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally -

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed

chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

UNITED STATES CODE
Title 21 - Food and Drugs
Chapter 13 Drug Abuse Prevention And Control
Subchapter I Control And Enforcement
Part D Offenses and Penalties

21 U.S.C. §846 - Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

UNITED STATES CODE
Title 28 - Judiciary and Judicial Procedure
Part IV Jurisdiction And Venue
Chapter 81 Supreme Court

28 U.S.C. §1254 - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

UNITED STATES CODE
Title 28 – Judiciary and Judicial Procedure
Chapter 58 – United States Sentencing Commission

28 U.S.C. §2255 – Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a

new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that not reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

FILED
NOV 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-383

In the Supreme Court of the United States

JAMES GILBERT BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), applies retroactively to all cases decided in the October 2004 Term, including cases that became final before *Booker* was decided.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter, but is reprinted in 186 Fed. Appx. 406. The opinion of the district court (Pet. App 11a-13a) is reported at 390 F. Supp. 2d 509.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2006. The petition for a writ of certiorari was filed on September 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of conspiracy to possess 500 grams or

more of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 11a-12a. Petitioner was sentenced to 360 months of imprisonment. *Id.* at 12a. The court of appeals affirmed, and this Court denied a petition for a writ of certiorari. 87 Fed. Appx. 312 (per curiam), cert. denied, 543 U.S. 818 (2004); Pet. App. 12a.

Less than one year later, petitioner brought a motion to set aside his sentence under 28 U.S.C. 2255 based on *United States* v. *Booker*, 543 U.S. 220 (2005). The district court denied the motion. Pet. App. 14a. The court of appeals denied petitioner's request for a certificate of appealability and dismissed the appeal. *Id.* at 4a.

1. On June 13, 2002, petitioner and twelve other individuals were indicted for conspiracy to possess 500 grams or more of a mixture of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Indictment 1-2. Following a jury trial in January 2003, petitioner was convicted. The jury found beyond a reasonable doubt that the object of the conspiracy was to possess, with intent to distribute, 500 grams or more of a mixture of methamphetamine. See Pet. App. 11a-12a. On April 11, 2003, the district court sentenced petitioner to 360 months of imprisonment, based in part on additional drug quantities not found by the jury. See *id.* at 12a; PSR ¶ 23. Petitioner appealed, and the court of appeals affirmed his conviction and sentence. See 87 Fed. Appx. at 312-314.

On June 14, 2004, petitioner filed a petition for a writ of certiorari. His sole claim was that the government had violated his rights under the Speedy Trial Act. See 03-1659 Pet. 6-13. Petitioner raised no Sixth Amendment challenge to his sentence under either *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or *Blakely* v. *Washing-*

ton, 542 U.S. 296 (2004). This Court denied the petition on Monday, October 4, 2004, the first day of the October 2004 Term.[1] 543 U.S. 818. Later that day, the Court heard argument in *Booker*, *supra*.

2. On January 12, 2005, this Court decided *Booker*. Based on that decision, petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. The district court denied the motion, noting that petitioner's conviction "became final prior to the decision in *Booker*" and holding that "*Booker* does not apply retroactively to his §2255 motion for collateral review." Pet. App. 12a.

Petitioner promptly filed a motion to reconsider, arguing that *Booker* applied to his case because "his writ of certiorari was pending during the same term that the rule in *Booker* was announced." Pet. App. 9a. The district court denied the motion, reiterating that petitioner's case was no longer pending at the time *Booker* was decided, and holding that "the fact that the ruling in *Booker* came down within a year of the final order in this case" does not mean that petitioner is entitled to resentencing. *Id.* at 9a-10a.

Both the district court (Pet. App. 7a-8a) and the court of appeals (*id.* at 1a-3a) denied petitioner's request for a certificate of appealability (COA) under 28 U.S.C. 2253(c)(1).

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[1] Petitioner incorrectly states (Pet. 6) that the October 2004 Term began on October 1, 2004. In fact, "[t]he Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year." Sup. Ct. R. 3. See 28 U.S.C. 2.

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred in denying his request for a COA because *Booker* applies retroactively to his case. He concedes that this Court denied his petition for a writ of certiorari more than three months before *Booker* was decided. Pet. 4. Nonetheless, he argues that he should benefit from retroactive application of *Booker* on the novel theory that "a case pending during a term of court must be found to benefit from the retroactive application of the favorable holding in another case decided during that same term." Pet. 5. Petitioner's position contravenes well-established precedent and has no support in law. Further review is unwarranted.

1. Under 28 U.S.C. 2253(c)(2), a COA may issue "only where a petitioner has made 'a substantial showing of the denial of a constitutional right.'" *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003) (quoting 28 U.S.C. 2253(c)(2)). To make such a showing, a petitioner must demonstrate that "jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983)). The court of appeals correctly concluded that petitioner failed to make the required showing because *Booker*, the sole basis for the Section 2255 motion, does not apply to his case.

a. As the Court's decision indicates, *Booker* v. *United States* applies "to all cases on direct review" at the time of the decision. 543 U.S. 220, 268 (2005) (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). In *Grif-*

fith, the Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U.S. at 328. For purposes of retroactivity analysis, a case is considered "pending on direct review" or "not yet final" if it remains pending or not yet final at the time the Court announces the new rule. See *id.* at 322-323 (explaining that "after we have *decided* a new rule in the case selected," the Court must "apply that rule to all similar cases pending on direct review") (emphasis added); *id.* at 329 (Rehnquist, C.J., dissenting) (agreeing with the majority insofar as it accepted Justice Harlan's view in *Mackey* v. *United States*, 401 U.S. 667, 681 (1981) (Harlan, J., concurring and dissenting), that "new constitutional rules governing criminal prosecutions should apply retroactively for cases pending on direct appeal *when the rule is announced*") (emphasis added). For example, in *Powell* v. *Nevada*, 511 U.S. 79, 80 (1994), a state supreme court had concluded that this Court's decision in *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), did not apply retroactively to any prosecution "commenced prior to the rendition of that decision." The Court rejected that argument, holding that the state court had misread *Griffith*: "'[A] . . . rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, . . . not yet final' *when the rule is announced*." *Ibid.* (emphasis added) (quoting *Griffith*, 479 U.S. at 328). See also *Teague* v. *Lane*, 489 U.S. 288, 304 (1989) (plurality opinion) (describing *Griffith* as articulating a new standard "for cases pending on direct review *at the time a new rule is announced*") (emphasis added).

The Court in *Griffith* offered two reasons for its holding. First, once the Court "ha[s] decided a new rule

in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Griffith*, 479 U.S. at 322-323. In the words of Justice Harlan, "the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Id.* at 323 (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring and dissenting)). Second, "selective application of new rules violates the principle of treating similarly situated defendants the same," *ibid.*, and the Court therefore "refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final," *Teague*, 489 U.S. at 304 (plurality opinion).

Both of those reasons reinforce that the crucial inquiry is whether a case has become final at the time the new rule is announced. First, when a case becomes final before the announcement of a new rule, the Court by definition has not "disregard[ed] current law," and instead has performed its constitutional function of adjudication. In articulating his concerns about the integrity of judicial review, Justice Harlan excluded cases that have "run the full course of appellate review" and become final. *Griffith*, 479 U.S. at 323 (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring and dissenting)). Second, when a case becomes final before the announcement of a new rule, no inequity results from failing to automatically apply the rule retroactively because defendants whose judgments have become final are not "similarly situated," *ibid.*, to defendants whose cases remain pending. As this Court noted in *Teague*,

"[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 489 U.S. at 309 (plurality opinion).

In this case, petitioner's original petition for a writ of certiorari on direct appeal was denied on October 4, 2004, more than three months before the announcement of *Booker*. 543 U.S. 818. According to this Court's "unvarying understanding," "[f]inality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires." *Clay* v. *United States*, 537 U.S. 522, 527-528 (2003). See *Griffith*, 479 U.S. at 321 n.6 (noting that a conviction becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). By that standard, petitioner's conviction was already final, and his case was no longer pending on direct review, when this Court decided *Booker*. As a result, *Booker* does not apply retroactively to his case.

b. Petitioner argues (Pet. 7) that this Court's retroactivity precedents produce "unconstitutionally arbitrary" results because too much depends on "the happenstance of the placement of the controlling case on the docket." He proposes, instead, that all cases on the Court's docket should benefit from the retroactive application of subsequent decisions during the same Term of Court, regardless of the actual time of disposition.

Petitioner cites no authority in support of his novel theory that final decisions should be treated as if they were "pending" on direct review for the remainder of

the Term, and no Justice of this Court has ever recommended it. On its face, petitioner's proposal would do little to resolve the problem of "arbitrar[iness]" of which he complains. He prefers a cutoff date at the beginning of each Term, but that rule just as "arbitrar[ily]" excludes petitions docketed and denied at the end of the previous Term, based solely on the "happenstance" of the docketing calendar. Petitioner offers no principled reason to reopen all final judgments from the same Term of Court, rather than all judgments that became final in the previous two Terms, or three Terms, or in the last calendar year, or in any number of other possible periods. See Pet. 6 (asserting, without explanation, that "a much greater effect would be accomplished with the clarity of the parameters for retroactive application having the opening day of a term as its starting point").

By contrast, this Court has offered sound reasons for its bright-line rule that constitutional decisions have automatic retroactive application only in cases that have not become final when the decision is announced. That "long-recognized, clear" rule provides guidance to litigants and courts, see *Clay*, 537 U.S. at 527-528, helps to ensure equitable treatment of similarly situated litigants, *Griffith*, 479 U.S. at 323, and affords proper respect to the final judgments of state and federal courts, see *Teague*, 489 U.S. at 309 (plurality opinion). Petitioner's claim that this Court's retroactivity precedents are "arbitrary" is simply incorrect.

To the extent that petitioner has raised an equitable objection to the treatment of his petition, as compared with the petitions in *Booker* and its companion case, *Fanfan* v. *United States*, 543 U.S. 220 (2005), intervention by this Court is unwarranted. Whenever a petition raises issues substantially similar to the questions pre-

sented in another case in which this Court already has granted certiorari, this Court has the option of holding the petition in abeyance pending the outcome of the other case. That action prevents the judgment from becoming final, and ensures that the petitioner will benefit from retroactive application of any new rule that emerges from the other case.

In this case, however, the Court did not hold petitioner's original petition in abeyance pending the outcome of *Booker* because the petition did not raise any Sixth Amendment or sentencing objection. The sole claim in the original petition was that the government had violated petitioner's rights under the Speedy Trial Act. Because that claim in no way depended on the outcome of *Booker*, the Court properly denied the petition, rather than holding the case for *Booker*. And because denial of the petition rendered the case final, *Booker* does not apply retroactively to petitioner's case. The court of appeals properly denied his request for a COA.

2. Petitioner makes no claim that *Booker* applies retroactively to all cases on collateral review. Even if he did, however, further review by this Court would be unwarranted. See U.S. Br. in Opp. at 6-11, *Guzman* v. *United States*, No. 06-5662, 2006 WL 2233210 (Oct. 30, 2006). All 11 courts of appeals that have addressed the issue have correctly concluded that *Booker* is not retroactive because it is a new rule of criminal procedure that is not a "watershed" rule. This Court also has denied review in at least eight cases raising the issue. See *id.* at 6. For the reasons set out in more detail in the brief in opposition in *Guzman*, there is no reason for this Court to review this retroactivity issue.

Moreover, petitioner's failure to raise any Sixth Amendment objection on direct appeal, see Mot. Under

28 U.S.C. 2255, at 3, forecloses the availability of collateral review of that issue now. The "general rule" in federal court is that "claims not raised on direct appeal may not be raised on collateral review." *Massaro* v. *United States*, 538 U.S. 500, 504 (2003). The procedural-default rule helps "to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Ibid.* To obtain review on the merits of this defaulted constitutional claim, petitioner must show either (1) "cause" for his default and actual "prejudice" or (2) that he is "actually innocent." *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (citations omitted). Because petitioner has made no attempt to demonstrate that either exception applies, he has procedurally defaulted that claim, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2006